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SUMMIT MEDICAL CENTER; and ALTA
BATES SUMMIT FOUNDATION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL FREEMAN, Case No. C04-2019 SBA
Civil Rights

Plaintiff,

v.

ALTA BATES SUMMIT MEDICAL
CENTER CAMPUS, et al.

Defendants. /

FULL CONSENT DECREE AND ORDER

1. Plaintiff MICHAEL FREEMAN is a person with a disability whose quadriplegia requires the full time use a wheelchair for mobility. Plaintiff alleges that defendants are the owners, operators and lessors of the building complex comprising the subject Alta Bates Summit Medical Center, Herrick Campus, also doing business as the Alta Bates Hospital, located in Berkeley, California. (Hereafter "Campus".) Located at 2001 Dwight Way in central Berkeley, the facility has both regional and national importance.

1 2. Plaintiff MICHAEL FREEMAN filed this action for
2 herself and all other similarly situated members of the public
3 to enforce provisions of the Americans with Disabilities Act of
4 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq., and corresponding
5 California law, including enforcement of Title 24 of the
6 California Code of Regulations, against defendants ALTA BATES
7 SUMMIT MEDICAL CENTER; and ALTA BATES SUMMIT FOUNDATION, et al.
8 ("Defendants").

9 3. Plaintiff alleges that defendants violated these
10 statutes by failing to provide full and equal access and
11 related facilities, including accessible entrances, accessible
12 paths of travel, accessible public restrooms, accessible
13 routes, including from the public right of way, accessible
14 snack bar and gift shop facilities, accessible disabled
15 parking, and accessible service counter facilities.¹ Specific
16 identification of the facilities and their deficiencies has
17 been identified by the parties through a meeting of experts and
18 exchange of reports.

19 4. Plaintiff alleges that defendants are also the
20 lessors of the interior tenant space (housed within the
21 building complex) occupied by former defendants LIFELONG
22 MEDICAL CARE d.b.a. BERKELEY PRIMARY CARE, where plaintiff
23 receives her medical care.

24 5. Plaintiff alleges that the complex has undergone
25

26 ¹ Plaintiff has already settled all issues with Berkeley Primary Care and Lifelong Clinic, including her
27 claims for injunctive relief and damages, i.e., concerning the facilities within the interior of the clinic.
28 Upon settlement with Lifelong, the only injunctive relief issues that remain are the issues outside the
clinic. However, her damage claims concerning such interior facilities are still at issue with respect to
the Alta Bates defendants.

1 construction triggering the requirement of full compliance with
2 compliance regulations in the altered areas, and that further
3 defendants could easily afford to makes its facilities and
4 services accessible without significant difficulty or expense.

5 6. For their part, Defendants do not deny that the
6 facility has undergone "alterations" and "new construction" in
7 each of the areas embraced by the expert reports. However,
8 Defendants contend, *inter alia*, that the areas identified by
9 plaintiff as "barriers" are not barriers under the code, but
10 are exempted by regulation and/or were constructed within
11 "tolerances" provided by code.

12 7. Therefore, Defendants' Answer to the Complaint denied
13 all liability, and by entering into this Consent Order,
14 defendants do not admit liability to the allegations in
15 Plaintiff's Complaint filed in this action. The parties hereby
16 enter into this Full Consent Decree and Order for the sole
17 purpose of resolving this lawsuit without the need for
18 protracted litigation.

19
20 **STIPULATIONS**

21 8. **Plaintiff's Qualified Disability.** Plaintiff is a
22 qualified person with a physical disability. She has
23 quadriplegia, and requires the full time use of a wheelchair
24 for mobility.

25 9. **Plaintiff's Residence and Status as Aggrieved and**
26 **Potentially Aggrieved.** Plaintiff lives in Berkeley less than a
27 mile from the Medical Campus. She qualifies as "aggrieved and
28 potentially aggrieved", and regularly uses the clinic Berkeley

1 Primary Care approximately 4 to 6 times per year for her
2 medical needs.

3 **10. Ownership, Operation and Lease of the Medical Campus.**

4 Defendant Alta Bates Summit Medical Center is the owner,
5 operator and lessor of the building complex comprising the
6 subject Alta Bates Summit Medical Center, which includes the
7 scope of facilities identified in paragraph 13, below. Said
8 defendant is also the lessor of the tenant space occupied
9 Berkeley Primary Care. (**Note:** the parties dispute the
10 connection of defendant separate of parent corporation
11 defendant ALTA BATES SUMMIT FOUNDATION to the subject property,
12 i.e., as an owner, operator, and lessor to the property.)

13 **11. Qualified Facilities** The Campus qualifies as a
14 "public accommodation" and "commercial facility" under all
15 applicable statutes and regulations.

16 **12. Construction History.** The parties stipulate that all
17 facilities in issue have undergone sufficient and recent
18 alteration and/or new construction to require full compliance
19 with the requirements of the Americans With Disabilities Act
20 Access Guidelines published in 1992 as well as the 1998 Edition
21 of Title 24, Part 2, of the California Code of Regulations.
22 The dispute pertains to the interpretation, scope and purpose
23 of the regulations.

24 **13. Scope of Facilities in Issue**

25 (a) The path of travel from the public sidewalk to
26 the main entrance;

27 (b) The parking facilities near the main entrance;

28 (c) The path of travel from the north side of the

1 Campus at Haste Street;

2 (d) The designated "accessible" parking facilities
3 at the north side of the Campus and the path of travel to the
4 rear entrance;

5 (e) The path of travel to the rear entrance at the
6 North side of the building Complex;

7 (f) The path of travel thru the give shop and
8 counter obstructions.

9 (g) The snack shop near the main lobby;

10 (h) The gift shop near the main lobby;

11 (i) The public restrooms near the main lobby;

12 (j) The public restroom in the hallway leading to
13 the Berkeley Primary Care Clinic; and

14 (k) Strictly for damage purposes, the configuration
15 of the public restroom within the interior of the Clinic.

16 All of the foregoing facilities are located along a direct
17 route from the public sidewalk and/or parking facilities to the
18 clinic. Other parts of the campus, hospital, and related
19 buildings were not inspected and are not part of this action.

20
21 **JURISDICTION**

22 14. The facts requisite to federal jurisdiction and venue
23 are admitted. This Court has jurisdiction pursuant to 28
24 U.S.C. § 1331 for the alleged violations of the ADA, 42 U.S.C.
25 §§ 12101, et seq. Article III jurisdiction is proper due to
26 the plaintiff's continued exposure and use of the clinic for
27 her regular medical care. Pendant jurisdiction of the state
28 law claims arises from a common nucleus of fact and is proper.

1 Venue and intra-district jurisdiction is proper as the property
2 in issue is located in Alameda County.

3 15. This agreement is contingent upon Court approval and
4 acceptance of normal jurisdiction to interpret and enforce this
5 Consent Decree.

6 16. The parties agree to entry of this Full Consent
7 Decree and Order in order to resolve the below listed
8 allegations raised in the Complaint filed with this Court on
9 May 24, 2004. Accordingly, they agree to the entry of this
10 Full Consent Decree and Order without trial or further
11 adjudication of any issues of fact or law concerning the issues
12 specified herein, and without prejudice to plaintiff's sole
13 remaining claim for reasonable statutory attorney's fees,
14 litigation expenses and costs.

15 WHEREFORE, the parties hereby agree and stipulate to the
16 Court's entry of this Consent Order, which provides as follows:

17
18 **RESOLUTION OF INJUNCTIVE RELIEF:**

19 17. Except as specified in Paragraph 33, below (regarding
20 the outstanding issue of plaintiff's claim for reasonable
21 statutory attorney fees, litigation expenses and costs), this
22 Full Consent Decree and Order shall be a full, complete, and
23 final disposition and settlement of the below claims for
24 injunctive relief and statutory and compensatory damages that
25 have been or could have been alleged in the Complaint. The
26 parties agree that there has been no admission or finding of
27 liability or violation of the ADA and/or California civil
28 rights laws, and this Consent Order should not be construed as

1 such. The Court shall retain jurisdiction of this action to
2 enforce and interpret this Consent Decree. The parties agree
3 that if they or any of them seek Court enforcement of this
4 Consent Decree and Order, any such enforcement will be by
5 noticed motion, application or other appropriate request for an
6 order for specific performance and that a contempt citation or
7 decree will not be sought by any party.

8 18. With respect to the injunctive relief and damage
9 claims resolved by this Order, the parties acknowledge that
10 they waive the provisions of and any benefits that may be
11 conferred by Civil Code section 1542 which reads:

12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
13 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
14 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
15 KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
16 SETTLEMENT WITH THE DEBTOR.

17 The provisions of this paragraph shall not affect the reserved
18 issues specified in Paragraphs 33 through 34, below.

19
20 **INJUNCTIVE RELIEF**

21 19. The defendants agree to perform the following work to
22 provide disabled access at the subject Campus:

23 20. **Parking**

24 (1) Defendants shall post a sign at the driveway to
25 main lot entrance (on Dwight Way) indicating where towed
26 vehicles may be recovered.

27 (2) Defendants will stripe and sign two (2) new
28 accessible parking spaces in the front (Dwight Way) parking lot

1 on Dwight Way (that is currently used by the valet service).
2 The parking spaces will be fully compliant with the current
3 codes including with regard to slope and cross slope, signage,
4 loading zones, and location along a fully compliant path of
5 travel to the main entrance.

6 (3) Remove accessible parking in rear lot by
7 removing accessible parking signage;

8 **21. Snack Bar**

9 (1) **Service Counter.** Defendants will modify the
10 counter in the Snack Bar counter to provide a surface that is
11 34" high by 36" long.

12 (2) **Condiment Counter.** Defendants will eliminate
13 the reach over the obstruction. If possible, this shall be
14 accomplished by moving the condiments, dispensers and related
15 loose items, forward on the existing counter to comply with
16 reach range requirements (i.e. 48" high for forward approach or
17 54" high for side approach).

18 **22. Gift Shop**

19 (1) **Transaction Counter.** Defendants shall lower the
20 existing glass display/transaction counter to 34" high. (Note:
21 this item is to be modified if possible by cutting legs if
22 needed. If the situation calls for modification or fabrication
23 of a full base or integral platform, the counter is to be left
24 as is and only the 36 inch wide space will be required on the
25 top of the counter.

26 (2) **Path of Travel.** Move an existing display in Gift
27 Shop to create a 36" aisle throughout the store.

28 **23. Public Restrooms near Main Lobby.** Defendants shall

1 modify the following:

2 (1) **Women's Room**

3 (a) Provide compliant signage (CBC pictograms
4 on door and ADA raised letter/braille on wall).

5 (b) Wrap hot water supply and waste pipe.

6 (c) Provide the operable part of each accessory
7 no higher than 40" from the finished floor.

8 (d) Provide a power assisted door opener to
9 mitigate strike-side clearance issue at door landing;

10 (2) **Men's Room** ^{2/}

11 (a) Provide compliant signage (CBC pictograms
12 on door and ADA raised letter/braille on wall).

13 (b) Wrap hot water supply and waste pipe.

14 (c) Provide the operable part of each accessory
15 no higher than 40" from floor.

16 (d) Adjust faucet operation effort to 5 lbs or
17 less.

18 **24. Main Entrance, Curb Ramp and Passenger Unloading**
19 **Facilities.** The defendants shall modify their facilities at
20 the Main Entrance, and the adjoining curb ramp and proposed
21 passenger unloading, to conform to the specifications shown in
22 the drawing at **Exhibits 1 and 2**, or according to another fully
23 compliant and equivalent design.

24 **25. Performance Standards.** All of the foregoing
25 facilities shall be brought into full and strict compliance

26 _____
27 ² **Note:** the parties stipulate that plaintiff has standing to
28 enforce accessibility requirements within the men's public
restroom due to her right to use such facilities when
accompanied by a male attendant.

1 with the literal requirements of the California Code of
2 Regulations, Title 24-2 (2005), and Americans with Disabilities
3 Act Accessibility Guidelines, effective January 26, 1992.

4 **26. Conflict in Performance Standards.** In the event of a
5 conflict between the two sets of regulations, the provisions
6 that supply maximum protection and accessibility to the
7 disabled shall apply.

8 **27. Option to Close Facilities.** In lieu of making
9 modification to any particular facility or amenity called for
10 by this decree, the defendants may choose to permanently close
11 such facility or amenity.

12 **28. Time for Compliance.** As to all other work,
13 defendants shall submit plans and apply for any necessary
14 permits for this work within 180 days of the entry of this
15 Order on the docket of the court, and complete all such work
16 within six months of receiving permits, allowing for good faith
17 interruptions due to inclement weather, contractor
18 unavailability, and other causes under the Doctrine of Force
19 Majeure.

20 **29. Enforcement.** Should Plaintiff in the future become
21 aware of any facts or conditions relating to the subject Campus
22 that may give rise to a claim that Defendants have failed to
23 comply with any of the injunctive relief provisions set forth
24 herein, Plaintiff shall, prior to seeking enforcement from this
25 Court, provide notice to Defendants' current counsel, Alan
26 Martini, Esq., in writing, addressed to his then current
27 address as registered with the State Bar, with a courtesy copy
28 addressed to owner-defendant Alta Bates Summit Medical Campus

1 at the its then current registered address with the Secretary
2 of State. The Campus shall have sixty (60) days, following
3 receipt of such notification to undertake to correct the
4 alleged violation and/or respond to Plaintiff's allegations.
5 Any response made by Defendants shall be in writing, addressed
6 to Plaintiff's counsel, Tim Thimesch of the Thimesch Law
7 Offices, at his then current address registered with the State
8 Bar. Plaintiff's counsel agrees to contribute pro bono up to
9 three hours in any given calendar year toward these informal
10 negotiation efforts. If Plaintiff determines, in her own good
11 faith discretion, that the matter(s) are not resolved by
12 Defendants' response, Plaintiff shall be permitted to file a
13 noticed motion under the current case number of this action
14 seeking enforcement of this Consent Decree. The prevailing
15 party in such motion proceedings, whether in full or in part,
16 may be entitled to an award of reasonable attorney fees,
17 litigation expenses and costs for such motion, i.e., the fee
18 recovery shall be pursuant to the normal prevailing party
19 standards that applied before the action's full dismissal.

20
21 **RESOLUTION OF PLAINTIFF'S DAMAGE CLAIM:**

22 30. Defendants shall pay plaintiff \$16,500.00 in full
23 resolution of all compensatory and statutory damage claims
24 brought under her complaint. A check for this amount shall be
25 delivered into plaintiff counsel's hands within 10 days of the
26 Court's execution of this Order. The check shall be made out
27 solely to "Michai Freeman."

28 ////

RESERVED ISSUES RE INJUNCTIVE RELIEF AND ATTORNEY FEES,
LITIGATION EXPENSES AND COSTS:

31. Plaintiff stipulates that her damage claims have been fully resolved through this Full Consent Decree and Order.

32. This Full Consent Decree also resolves all injunctive relief claims brought under the Complaint, including those listed in the Joint Pretrial Statement (filed by the parties on October 13, 2005) at: **paragraphs (C)(vii)(a)(i)-(ii) at pages 6 through 9** (Re parking facilities on Dwight Way); **paragraphs (C)(b)(v) - (vii) at page 9** (Re parking and path of travel facilities on Haste Street); **paragraph (C)(d) at page 10** (Re the path of travel in Gift Shop); **paragraph (C)(e)(i)-(iv) and (vi)-(vii) at pages** (Re certain counters and the public restrooms in the main lobby); **paragraphs (C)(b)(i)-(iv) at pages 8 through 9 and (e)(v) on page 12** (Re the Campus' passenger unloading, curb ramp and main entrance facilities on Dwight Way); and **paragraph (C)(c) on page 10** (Re the configuration of the dining tables in the Deli and Snack Shop).

33. The parties have not reached an agreement regarding Plaintiff's claim for attorney fees, litigation expenses and costs for this case (and any appropriate enhancement), and reserve such issues for trial or appropriate disposition. The parties agree to continue their attempt to compromise Plaintiff's remaining claim for attorney fees, litigation expenses and costs.

34. Therefore, if the Court approves this Full Consent Decree and Order, the parties request the setting of the following schedule for moving for an award of fees, costs and

1 expenses, which includes reasonable attorneys fees incurred in
2 making the motion: 1) the deadline for filing the motion shall
3 be within 60 days after final judgment in this action; 2) the
4 deadline for defendants to file any opposition papers shall be
5 within 30 days of the filing of plaintiff's notice of motion;
6 3) any reply papers shall be with 15 days thereafter.
7 Plaintiff may move for an award of fees, costs and expenses,
8 which include reasonable attorneys fees incurred in the action
9 and in pursuing her Motion for Award of Reasonable Statutory
10 Attorney's Fees, Litigation Expenses and Costs, and defendants
11 may state objections to an award of costs through their
12 opposition papers. These procedures shall apply in lieu of the
13 procedures specified in Civil Local Rules 54-1 through 54-6,
14 with the exception that counsel should comply with Rule 54-6(a)
15 with respect to meet and confer requirements and that sub
16 section (b)(1) through (3) shall apply re form of motion and
17 the court's prerogatives as set forth in said Local Rule.

18 35. Notwithstanding any statement in this Full Consent
19 Decree and Order regarding defendants' dispute of the
20 allegations and/or non-admission and denial of liability, the
21 parties agree that plaintiffs have prevailing party standing to
22 make a motion for reasonable fees, litigation expenses and
23 costs. Defendants reserve all rights to oppose such a motion.

24
25 **ENTIRE CONSENT ORDER:**

26 36. This Full Consent Decree and Order constitutes the
27 entire agreement between the parties on the matters of
28 injunctive relief, and no other statement, promise, or

1 agreement, either written or oral, made by any of the parties
2 or agents of any of the parties, that is not contained in this
3 written Consent Order, shall be enforceable regarding the
4 matters of injunctive relief described herein. The issues
5 specified in Paragraphs 32 through 34 shall constitute the sole
6 matters reserved for trial or further disposition.

7
8 **CONSENT ORDER BINDING ON PARTIES AND SUCCESSORS IN INTEREST:**

9 37. The parties agree and represent that they have
10 entered into this Full Consent Decree and Order voluntarily,
11 under no duress, and wholly upon their own judgment, belief,
12 and knowledge as to all matters related to this Consent Decree,
13 after having received full advice from counsel.

14 38. This Full Consent Decree and Order shall be binding
15 on Plaintiff MICHAEL FREEMAN, and Defendants ALTA BATES SUMMIT
16 MEDICAL CENTER; and ALTA BATES SUMMIT FOUNDATION; and any
17 successors in interest. During the period of this Consent
18 Decree, the parties have a duty to so notify all such
19 successors in interest of the existence and terms of this
20 Consent Decree and Order during the period of the Court's
21 jurisdiction of this Consent Decree.

22
23 **JOINT PREPARATION AND SEVERABILITY:**

24 39. This Full Consent Decree and Order is deemed jointly
25 prepared by all parties and shall not be strictly construed
26 against any party as its drafter. If any term of this Consent
27 Order is determined by any court to be unenforceable, the other
28 terms of this Consent Order shall nonetheless remain in full

1 force and effect.

2
3 **SIGNATORIES BIND PARTIES:**

4 40. Signatories on the behalf of the parties represent
5 that they are authorized to bind the parties to this Full
6 Consent Decree and Order.

7
8 **SIGNATORIES BIND PARTIES:**

9 41. This Full Consent Decree and Order may be executed in
10 counterparts signatures, and such signatures may be attached in
11 counterparts, each of which shall be deemed an original, and
12 which together shall constitute one and the same instrument.
13 Such counterparts may be signed as faxed signatures, which
14 shall have the same force and effect as original signatures.

15
16 Dated: _____

17
18 _____
19 Plaintiff MICHAEL FREEMAN

20 Dated: _____

21 _____
22 Print Name: _____

23 Title: _____
24 On Behalf of Defendants ALTA BATES
25 SUMMIT MEDICAL CENTER; and ALTA
26 BATES SUMMIT FOUNDATION

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APPROVED AS TO FORM:

Dated: October 18, 2005

Thimesch Law Offices

TIMOTHY S. THIMESCH



Attorneys for Plaintiff
MICHAEL FREEMAN

Dated: October __, 2005

ALAN L. MARTINI, ESQ.
SHEUERMAN, MARTINI & TABARI

Attorneys for Defendants ALTA
BATES SUMMIT MEDICAL CENTER; and
ALTA BATES SUMMIT FOUNDATION

ORDER

IT IS SO ORDERED. _____

_____.

Date: 11/18/05



HON. SAUNDRA BROWN ARMSTRONG
Judge of U.S. District Court

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